1976

State of Utah v. David Lewis Moore : Brief of Defendant-Appellant

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff--Respondant,	)	Case No.
vs.	)	14607
DAVID LEWIS MOORE, Defendant--Appellant.	)	

BRIEF OF DEFENDANT--APPELLANT

Appeal from the verdict of a District Court Jury in and for the First Judicial District of Box Elder County, State of Utah, the Honorable Vency Christoffersen, presiding.

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TABLE OF CONTENTS

Cases Cited

TABLE OF CONTENTS
Continued

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Defendant--Appellant.	*	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Defendant--Appellant appeals from the judgment upon a jury verdict in a criminal action brought against him by the State of Utah for an alleged violation of 58-37-8, Utah Code Annotated, 1953, to-wit, possessing a controlled substance with intent to distribute the same for value.

DISPOSITION IN LOWER COURT

A jury found the Defendant--Appellant guilty and the Defendant was subsequently sentenced notwithstanding Defendant's motions for a "mistrial" and "juror challenges for cause" which were denied by the Honorable Venoy Christoffersen.

RELIEF SOUGHT ON APPEAL

Defendant--Appellant respectfully prays that the verdict be vacated and set aside and a new trial ordered.

STATEMENT OF THE FACTS

On the 14th day of April, 1976 the Honorable Venoy Christoffersen convened court to begin the trial of the Appellant--Defendant in the First Judicial District Court in and for the County of Box Elder, State Of Utah, for the alleged crime of "Possessing a controlled substance with the intent to distribute the same for value" contrary to the law of the State of Utah, to-wit: 58-37-8 Utah Code Annotated, 1953.

The roll call of potential jurors was had and 24 out of 35 on the Jury List responded as present. (See Jury List and page 2, lines 13 through 15 of Court Transcript)

Of the potential jurors present, sixteen of the twenty-four present were drawn, (See page 082 of Court Minutes and page 6, lines 29 and 30, through page 7, line 2 of Court Transcript) thus leaving eight in the jury pane not summoned to the jury box.

The sixteen drawn for potential jury duty were as follows:

1. Marge K. Newman
2. Lorna Nelsen
3. Morris F. Rhodes
4. Navelle N. Rhodes
5. Clarence F. Westly
6. Gerrald Lynn Sorensen
7. June E. Paulsen
8. Vaughn U. Larsen
9. Miles D. Roundy
10. Steven Misrasi
11. Trent Thompson
12. Ray Don Reese
13. Dean C. Youngkeit
14. Charles E. Noble
15. S. Terry Rock
16. Darrell Ravenberg

(See Court Transcript, page 14, line 9, through page 15, line 22)

Thereafter the said panel of sixteen potential jurors were questioned by the state, the defense and the court.

That the prosecuting attorney, as one of his questions, said the following:

"Now let me ask you further a general question. Is there anything in any of your minds that I haven't brought up that you think would prevent you from rendering a fair verdict in this case? In other words, from entering the case and before you hear the evidence with a completely neutral mind?"

(See page 23, lines 21 through 27 of Court Transcript)

That thereafter Mr. Rock in response to the question said:

"I feel very strongly against people that use or sell narcotics. I don't know whether I could be fair in a verdict or not."

(See page 23, lines 28 through 30 of Court Transcript)

That thereafter the court asked the following question:

"I will ask you, Mr. Rock, would you assign a title of guilt or innocence to a person on that basis?"

(See page 24, lines 2 and 3 of Court Transcript)

Mr. Rock replied as follows:

"I don't know how to answer that, Judge. I don't know how to answer that. I do have a very strong feeling against people that would sell--"

(See page 24, lines 4 through 6 of Court Transcript)

The court then asked Mr. Rock the next question:

"Yes, I am sure we all have things that are very repulsive to us. A murder of a young child or a rape of a young woman, this is very repulsive in our own minds and I an sure that that very fact, the type of crime, may arouse a feeling in your mind against a person who would do that. But, what we are saying here is to find guilt or innocence, not make a judgment as to whether it's a bad or good thing. We are not saying or attempting to say whether this is a good or a bad thing for a person to do, we are hear for the purpose of determining whether they are guilty or innocent. Do you think that you can sit as a person and listen to the facts and make that determination regardless of what the offense is?"

(See page 24, lines 7 through 18 of Court Transcript)

Mr. Rock's final reply was:

"I still don't -- I still can't answer the question yes or no, I don't think. I am not sure in my own mind whether I would or not."

(See page 24, lines 19 through 21 of Court Transcript)

Thereafter, in response to the same question, Mr. Westly said the following:

"Yes. About four or five years ago we were witnesses and caused a group of young people to be picked up on drugs. We were supposed to be called. We never did hear what happened, but we were there during the search and seizure of the materials. The ambulance picked up the young girl that was involved. We went through the whole thing at the time it happened."

(See page 24, lines 24 through 30 of Court Transcript)

That thereafter, counsel for the defense challenged for cause Mr. Rock and Mr. Westly which said challenge the court denied. (See page 28, lines 21 through 30, page 29,1 through 29 and page 30, lines 1 through 21 of Court Transcript).

That in the Voir Dire examination of the jury, defense counsel asked the following:

"I do have one or two questions. You have indicated to Judge Christoffersen's question that you were not the client of either myself and Mr. Bunderson and I would ask one more question. I don't believe that I have personally been acquainted with any of you. Have any of you had any past acquaintenceship with me? I don't recall anybody. Are there any of you here that's been a past client of Mr. Bunderson, the prosecuting attorney here? None of you know him? I presume that none of you -- excuse me, did I have a hand? Yes, sir?"

(See page 26, lines 13 through 21 of Court Transcript)

That in response to the foregoing question, Mr. Reese acknowledged a past acquaintenceship with the prosecutor, Mr. Bunderson, and specifically, Mr. Rhodes of the jury panel remained silent.

That during the noon luncheon, defense counsel observed the prosecuting attorney fraternizing with two jurors and specifically defense counsel heard Mr. Rhodes make the following comment to the prosecutor:

"I always thought you were going to be a doctor."

(See page 34, lines 8 and 9 of Court Transcript)

Whereupon defense counsel immediately made a motion for a mistrial. (See page 33, lines 23 through 30, page 34, lines 1 through 30, page 35, lines 1 through 30 and page 36, lines 1 and 2 of Court Transcript)

That at the time that defense counsel made its motion for a mistrial the prosecutor stated that Mr. Rhodes, the juror, had approached him and stated "I would like to get out of here," or that he was in a hurry to get out of here.
(See page 34, lines 28 and 29 of Court Transcript)

That thereafter, Mr. Bunderson, in an apparent attempt to patronize and placate the juror, failed to call all of his witnesses. That Mr. Bunderson indicated to the jury in his opening Voir Dire that he would be calling James Allred, David Holly and Dennis Abel as witnesses, (See page 9, lines 16 through 24 of Court Transcript) and that the prosecution did, in fact, call James Allred and Dennis Abel but failed to call the third witness, David Holly, in an apparent attempt to influence and patronize Mr. Rhodes and to comply with the juror's request to hurry the matter along.

ISSUE OF LAW

Point 1

It is contended by the Defendant--Appellant that the trial court's refusal to dismiss two jurors, both of whom indicated that as a result of prior experiences they did not feel that they could sit with a completely neutral mind and be fair, is prejudicial error.

Point 2

It is also contended by the Defendant--Appellant that the failure of Mr. Rhodes, one of the jurors, to disclose a prior acquaintenceship with the prosecuting attorney when asked, is prejudicial error.

Point 3

It is further contended by the Defendant--Appellant that the prosecutor's fraternizing with two jurors during a noon break and his patronizing one of the jurors, is prejudicial error.

ARGUMENT

POINT I

It is contended by the Defendant--Appellant that the two jurors who stated that prior experiences made it such that it would prevent them from rendering a fair verdict, should have been excused from the case. Defendant--Appellant relies upon Crawford vs. Manning Utah Reporter 533-542 p 2d page 1091, November 25, 1975.

In the Crawford vs. Manning case, a juror stated that she had strong feelings concerning anyone who would sue to recover money for the death of another but later stated that she could render a verdict free of bias and prejudice. The trial court refused to excuse her notwithstanding the fact she was challenged for cause and there were eight additional jurors that could have taken her place.

Justice Ellett stated in the unanimous opinion the following:

> "One doubts that a person who harbors strong feelings concerning anyone who would sue to recover money for the death of another could be a fair and impartial juror. She should have been excused peremptorily and one of the eight surplus jurors placed in the box.
>
> It is no excuse to say that the verdict was unanimous and since six of the eight jurors could find a verdict, the error was harmless. By exercising one of their peremptory challenges upon this prospective juror, plaintiffs had only two remaining. The juror which remained because the plaintiffs had no challenges to remove him may have been a hawk amid seven doves and imposed his will upon them.
>
> A party is entitled to exercise his three peremptory challenges upon impartial prospective jurors, and he should not be compelled to waste one in order to accomplish that which the trial judge should have done."

The case at hand is even more compelling than the Crawford vs. Manning case because in the present case the juror, Mr. Rock, was never able to say that he could render a fair verdict while in the Crawford vs. Manning case the juror ultimately said she could render a fair verdict.

It should also be pointed out that the court could have easily dismissed Mr. Rock and Mr. Westly when challenged because an additional eight jurors were waiting and could have been drawn upon for the jury panel.

Therefore, it is respectfully argued that the court's failure to honor

the Defendant's challenge to two jurors both of whom had stated that because of prior experiences they could not render a fair verdict, is prejudicial error. Thus causing the Defendant--Appellant to waste two challenges in order to accomplish that which the trial judge should have done.

POINT II

It is also contended by the Defendant--Appellant that the juror Mr. Rhodes, whose failure to make a full disclosure of an acquaintenceship with the prosecutor, constituted prejudicial error.

The law is stated succinctly in 50 Corpus Juris Secundum as follows:

> "Prospective jurors must fully, fairly and truthfully answer all questions on Voir Dire examination, and disclose any material information which might bear on their qualifications."

The proposition is further supported in Wood vs. Henley 296 N.W. 657, 296 Mich. 491 and O'brien vs. Vandalia Bus Lines 173 S.W. 2d 76 351 Mo., 500.:

> "On Voir Dire examination, prospective jurors must fully, fairly and truthfully answer all questions directed to them so that challenges may be intellegently exercised and unsuitable persons excused."

In the case of McHugh vs. Jones 16 N.Y. s 2d 258 29 N.E. 2d 76, it stated referring to jurors as follows:

> "Whether or not specifically questioned, they should disclose any material information which might bear on their qualification."

When Mr. Rhodes failed to fully advise the defense of his acquaintenceship with the prosecutor, he failed to give the defense a full opportunity to make an intellegent challenge and the juror's subsequent solicitation of the prosecutor and conversation with the prosecutor at the noon break sustains the defense's argument as the juror would have surely been peremptorily challenged by the defense had it known of this intimacy.

POINT III

The final contention of the Defendant--Appellant is the impropriety of a juror conversing with the prosecutor during the noon break wherein the juror makes it known to the prosecutor that he is anxious for the trial to be completed quickly and the prosecutor subsequently accommodating the juror.

The Defendant--Appellant relies upon The State of Utah vs. Billy Wayne Black Utah State Supreme Court #14211, Green Sheets Decision, dated June 16, 1976. In that case, Justice Ellett said the following which was the unanimous decision of the court:

> "It is generally considered to be improper for a juror to converse during the trial of a case with a witness unless he is authorized to do so. However, unless there is some showing of prejudice to the defendant, a conviction should be affirmed, notwithstanding the impropriety. This is especially true where the conversation is merely a remark of civility and not related to the case. The trial court afforded counsel for the defendant ample opportunity to examine the jurors but no prejudice was shown."

It is Defendant--Appellant's contention that it makes little difference whether the juror speaks to a witness or a prosecutor if there is a showing of prejudice as a result of said conversation and in the fact situation at hand, we find such an impropriety, to-wit: a juror making it known to the prosecutor that he is in a hurry and is anxious to get the trial over with and the prosecutor then accommodating the juror's wish by failing to call a witness which he had advised the jury he would call and the decision by the prosecutor not to call the witness being made after the conversation with the juror.

The effect of the impropriety is obvious; the prosecutor did not wish to offend the juror who was in a hurry and indeed the very juror who had some personal acquaintenceship with the prosecutor. Whether the prosecutor and the juror were deliberate in their actions can never by known by the Defendant--Appellant but in the conduct of a trial where a person's good name is at stake and his personal liberty, the Defendant--Appellant believes that not only impropriety should be avoided but also the appearance of impropriety.

CONCLUSION

Based upon the court's refusal to dismiss two jurors who in response to a prosecutor's question indicated that based on prior experiences they did

not think that they could render a fair verdict; and a juror's neglect or refusal to make a full and complete disclosure of an obvious prior acquaintenceship with the prosecutor; and the prosecutor's fraternization with two jurors during a noon break wherein a juror makes a request of the prosecutor and the prosecutor subsequently patronizes the juror, it is respectfully submitted that the Defendant--Appellant did not receive a fair trial.

WHEREFORE, it is respectfully requested that this Honorable Court order that a new trial for the Defendant--Appellant be held.

Respectfully submitted,

Darrell G. Renstrom

DARRELL G. RENSTROM
Attorney for Defendant--Appellant

CERTIFICATE OF MAILING

I, Darrell G. Renstrom, attorney for Defendant--Appellant, hereby certify that I mailed a true and correct copy of the above and foregoing Brief of Appellant to Jon Bunderson, Assistant County Attorney, at his address at Box Elder County, Brigham City, Utah, this 28th day of July, 1976.

Darrell G. Renstrom

DARRELL G. RENSTROM

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS CONTINUED

Page